



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 27, 2015

Jeffrey Steen
542 Mitchell Drive
Los Osos, CA 93402

Re: Your Request for Advice
Our File No. A-15-097

Dear Mr. Steen:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Section 1090.

This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance.²

Pursuant to Section 1097.1(c)(4), we have forwarded your request to the Attorney General’s Office and the San Luis Obispo District Attorney’s Office concerning potential issues raised under Section 1090 and we did not receive a written response from either entity.

Please note that our advice is based solely on the provisions of the Act and Section 1090. We offer no opinion on the application, if any, of other conflict of interest laws such as common law conflict of interest. Finally, the following advice is not admissible in a criminal proceeding against any individual other than the requestor.³

QUESTIONS

1. As an elected member of the California Citrus Research Board (“CRB”), may you participate in decisions involving potential consulting clients if they apply for CRB grants?
2. May you help your consulting clients identify potential sources of grant funding including grants from CRB?
3. May you participate in general CRB decisions involving “pest management issues?”

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² *In re Oglesby* (1975) 1 FPPC Ops. 71.

³ Section 1097.1(c)(5).

CONCLUSIONS

1. No. Both the Act and Section 1090 prohibit you from participating in decisions involving potential consulting clients applying for CRB grants because you have a financial interest in your clients, and it is reasonably foreseeable that the decisions will have a material financial effect on them.

2. Yes. Identifying potential sources of funding is not prohibited by the Act or Section 1090. However, you may wish to identify funding sources other than CRB because Section 1090 prohibits the CRB from contracting with or awarding CRB grants to your clients.

3. Yes. You may participate in general CRB decisions regarding pest management issues provided it is not reasonably foreseeable for the governmental decisions to have a material financial effect on your clients or any other financial interests you may have.

FACTS

You are an elected member of the CRB District 1 in Northern California. You are also a citrus grower and run a consulting business advising agriculture and food companies. You are exploring potential opportunities to consult with various firms, including those that specialize in information technology. For instance, your potential clients would include companies that specialize in the application of data to farming involving water and pest management issues.

Potential projects would consist of providing product design advice and pest management consulting. You would also help firms identify potential sources of funding such as research grants. For instance, you would research grant opportunities from various foundations and government entities and help clients identify programs for which they would be eligible.

CRB has a Pest Management committee that focuses on pest issues. You do not sit on that committee, but you have on occasion voted on projects related to that committee.

You wish to know if you would have a conflict of interest in helping clients identify potential sources of grant funding, including grants from CRB, and whether you may participate in decisions involving potential consulting clients if they apply for CRB grants. Lastly, you wish to know if you may participate in general decisions involving “pest management issues.”

ANALYSIS

Conflict of Interest under the Act:

Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has a financial interest.

Financial interests include:

- Any real property in which the public official has a direct or indirect interest of at least \$2,000. (Section 87103(b).)
- Any business entity in which the public official has a direct or indirect investment worth at least \$2,000 and any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d).)
- Any source of income, such as a business entity, from which the official has received income of \$500 or more within 12 months before the decision. This also includes income from any client of the business entity of at least \$500, provided to and received by the public official within 12 months before the decision is made. (Section 87103(c).)
- Any donor of gift(s) amounting to a total of at least \$460 within 12 months before a decision is made. (Section 87103(e).)
- A public official's own personal finances, or those of a member of his or her immediate family. (Section 87103).)

As an elected member of the CRB, you are a public official. You have financial interests in both your consulting business and any clients from which you receive an income of \$500 or more. We focus on your financial interest in your clients as sources of income.

1. Foreseeability and Materiality

CRB Grants to Potential Client:

A financial effect is presumed reasonably foreseeable if the financial interest is the subject of a governmental decision before the official or the official's agency. (Regulation 18701(a).) A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest. (Regulation 18701(a).)

Similarly, a reasonably foreseeable financial effect of a governmental decision on an official's financial interest is material if the source is an applicant, contracting party, or is otherwise named or identified as the subject of the proceeding. (Regulation 18702.3).

Here, the CRB would make decisions regarding whether your clients would receive grants. As grant applicants, your clients would be the subject of the proceeding and any financial effect of the decision is presumed to be reasonably foreseeable and material.

Therefore, you have a disqualifying financial interest in these types of decisions and you are prohibited from voting on, directly participating in, or influencing any grant applications submitted to CRB by your clients.

Decisions Regarding Pest Management Issues:

Your facts indicate you will be making occasional decisions involving pest management issues. However, you do not specify any particular governmental decisions involving your potential consulting clients. Your participation is not prohibited by the Act, and you may make or participate in making decisions regarding “pest management issues” so long as there is no reasonably foreseeable material financial effect on your potential clients or any of your other financial interests.

2. Public Generally

A public official is prohibited from making, participating in making, or influencing governmental decisions if the reasonably foreseeable material financial effect is distinguishable from the public generally.

Regulation 18703 states the financial effect is indistinguishable if “a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment.”

A significant segment of the public consists of at least 25% of all businesses or non-profit entities within the official’s jurisdiction. Regulation 18703(d) defines “jurisdiction” as “the region, county, city, district or other geographical area in which [the agency] has jurisdiction” or “the designated geographical area the official was elected to represent, or the area to which the official’s authority and duties are limited if not elected.”

Here, as a member of CRB District 1, your jurisdiction is Northern California. You did not provide details about the number or types of grants that CRB would be awarding. However, it is unlikely that grants affecting your potential consulting clients will affect 25% of all business or non-profit entities in that region. Thus, the exception would not apply.

3. Disqualification

Since you have a disqualifying financial interest, you are prohibited from voting on, directly participating in, or influencing any grant applications submitted by your clients.

An official is making a decision if the official “authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his agency.” (Regulation 18704(a).) Participating in a decision occurs when the official “provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.” (Regulation 18704(b).) Lastly, an official uses his or her position to influence a decision if the official contacts or appears before any official in his or her agency for the purpose of affecting a decision. (Regulation 18704(c).)

In addition, Section 87105 and Regulation 18707 require you to publicly identify each type of financial interest involved that gives rise to the disqualifying conflict of interest. The identification must be made after the announcement of the agenda item to be discussed or voted

upon, but before the discussion or vote commences. You must also recuse yourself and leave the room after identifying the forms of conflict.

Government Code Section 1090:

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties.⁴ Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies.⁵

We employ a six-step analysis to determine whether an official has a disqualifying conflict of interest under Section 1090.

Step One: Is the official subject to the provisions of Section 1090?

Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed. As an elected member of CRB, a state agency,⁶ you are subject to the provisions of Section 1090.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law,⁷ while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’”⁸

Here, the decisions at issue involve research grants, which are written agreements between CRB and the grant recipients. Grants are generally “contracts” under Section 1090.⁹ Accordingly, decisions to award CRB research grants are decisions involving contracts under Section 1090.

⁴ *Thomson v. Call* (1985) 38 Cal.3d 633, 646.

⁵ *Stigall v. Taft* (1962) 58 Cal.2d 565, 569.

⁶ The Citrus Research Program is established by the California Marketing Act and is administered by the Citrus Research Board.

⁷ 84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).

⁸ *People v. Honig* (1996) 48 Cal.App.4th 289, at p. 351 citing *Stigall*, *supra*, at pp. 569, 571.

⁹ *People v. Honig*, *supra*, 48 Cal.App.4th 289. The court rejected a claim that a grant was not a contract within the meaning of Section 1090.

Step Three: Is the official making or participating in making a contract?

You would be making or participating in making a contract if you vote or participate in awarding a CRB research grant. As a CRB member, your participation in awarding grants is presumed under Section 1090, regardless of whether you actually participate in the decision.¹⁰ If a board member is financially interested in the contract, and no exception applies, Section 1090 prohibits the contract from being made.

Step Four: Does the official have a financial interest in the contract?

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.”¹¹ Officials are deemed to have a financial interest in a contract if they might profit from it in any way.¹²

While Section 1090 does not define “financial interest,” the courts have issued decisions applying this provision. In a recent case, an appellate court stated: “The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official’s loyalties and compromise the undivided representation of the public interests the official is charged with protecting.”¹³

“The certainty of financial gain is not necessary to create a conflict of interest The government’s right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.”¹⁴ California courts have consistently voided contracts where the public official is the supplier of services or goods to the contracting party. Even though an officer may not directly benefit from the terms of the contract, it is significant that the contract will contribute to the financial health of the contracting party with which the officer is associated.

Similarly, you are a board member but you receive income from your clients who are parties seeking to contract with CRB for the research grants. While you might not directly benefit from awarding a grant to your clients, the award will contribute to your clients’ financial health. Therefore, you are financially interested in the grant applications of your clients.

¹⁰ When board members have the power to execute contracts, participation is constructive. Thus, where an official is a member of a board or commission that has the power to execute the contract, he or she is presumed to be involved in the making of his or her agency’s contracts irrespective of whether he or she actually participates in the making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen 49 (2006).)

¹¹ *People v. Honig, supra*, at p. 333.

¹² *Ibid.*

¹³ *Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal. App. 4th 208, 221.

¹⁴ *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).

Step Five: Does either a remote interest or a non-interest exception apply?

As a general rule, when Section 1090 is applicable to one member of a governing body of a public entity, as here, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract.¹⁵ However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5.

If there is a "remote interest," the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity's official records, and (3) the officer abstains from any participation in the making of the contract.¹⁶ If a "noninterest" is present, the contract may be made without the officer's abstention, and generally a noninterest does not require disclosure.¹⁷

From the facts you provided, your financial interest in your clients does not qualify as a "remote interest" or "noninterest." Therefore, you may not avoid the prohibition under Section 1090 by abstaining from participating in the making of the contract.

Step Six: Does the rule of necessity apply?

In limited circumstances, a "rule of necessity" has been applied to allow the making of a contract that Section 1090 would otherwise prohibit.¹⁸ Under the rule of necessity, a government agency may acquire an essential service, despite the existence of a conflict, when no source other than that which triggers the contract is available; the rule "ensures that essential government functions are performed even where a conflict of interest exists."¹⁹

You have provided no facts to suggest the "rule of necessity" would apply in the present situation.

Therefore, Section 1090 prevents you from participating in government decisions that have a financial effect on any of your clients. In addition, Section 1090 prevents the CRB from taking action on contracts relating to those clients even if you do not participate in your official capacity in approving or denying the grant applications.

¹⁵ *Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).

¹⁶ Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).

¹⁷ *City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).

¹⁸ 88 Ops.Cal.Atty.Gen. 106, 110 (2005).

¹⁹ *Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Emelyn Rodriguez
Senior Counsel, Legal Division

ER:jgl